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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK HODGES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. IMMERSION CORPORATION, et al., Defendants.	No. 09-cv-04073-MMC CLASS ACTION REPLY MEMORANDUM IN FURTHER SUPPORT OF JOHN P. LOOS'S MOTION FOR CONSOLIDATION, APPOINTMENT OF LEAD PLAINTIFF AND APPROVAL OF SELECTION OF COUNSEL DATE: December 18, 2009 TIME: 9:00 a.m. COURTROOM: 7

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John P. Loos ("Mr. Loos") respectfully submits this memorandum in further support of his motion for appointment as lead plaintiff and for approval of selection of lead counsel filed on November 2, 2009 (Dkt. No. 24) and in response to the memorandum in opposition to the motion to appoint Mr. Loos as lead plaintiff, filed by Norbert Muller ("Mr. Muller") on November 25, 2009 ("Muller Opp.") (Dkt. No. 46).

I. INTRODUCTION AND BACKGROUND

Messers. Loos and Muller have timely filed competing motions to be appointed as lead plaintiff and to have their respective choice of counsel approved as lead counsel. Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Court must appoint the movant who has the largest financial interest and who otherwise satisfies the requirements of Fed. R. Civ. P. 23. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb); *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002). In this case, Mr. Loos, who suffered a loss of ***over $1,200,000*** under a first-in, first-out ("FIFO") accounting method,[1] is the statutorily presumptive lead plaintiff. In contrast, Mr. Muller's claimed loss is only $196,161.

Nevertheless, Mr. Muller, whose claimed loss is almost ***84% smaller than Mr. Loos's loss*** argues that Mr. Loos's seven-figure loss should not be considered in determining which movant has the "greatest financial interest in the relief sought" because FIFO, a well-recognized accounting method used for calculating losses, including stock losses for tax reporting purposes, has occasionally not been used by some courts. This argument has no merit. In fact, numerous courts have chosen the FIFO method to calculate losses in selecting the appropriate PSLRA lead plaintiff. *See, e.g.*, *Hodges v. Akeena Solar, Inc.*, No. C 09-02147 JW, 2009 U.S. Dist. LEXIS 103663, at *6-*7 (N.D. Cal. Oct. 21, 2009); *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys.*, No. C 01-20418 JW, 2004 U.S. Dist. LEXIS 27008, at *11 (N.D. Cal. May 27, 2004); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-0829, 2003 U.S. Dist. LEXIS 26297, at *26 (D.N.J. Oct. 10, 2003);

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[1] *See* Declaration of Tricia McCormick in Support of John P. Loos's Motion for Consolidation, Appointment of Lead Plaintiff and Approval of Selection of Lead Counsel ("McCormick Decl."), filed November 2, 2009, Ex. B (Dkt. No. 25).

In re AOL Time Warner, Inc. Sec. & ERISA Litig., No. 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *61-*62 (S.D.N.Y. Apr. 6, 2006); *In re Veeco Instruments, Inc.*, 233 F.R.D. 330, 333 (S.D.N.Y. 2005). Therefore, Mr. Loos possesses the largest financial interest by far and is, therefore, the presumptive lead plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

Moreover, despite Mr. Muller's clearly erroneous contention that the last-in, last-out ("LIFO") accounting method "is the preferred method for calculating a lead plaintiff movant's losses" (Muller Opp. at 6) here, Mr. Loos has the largest loss under the LIFO method as well. As Mr. Muller ***admits***, Mr. Loos's LIFO loss is ***$256,821.02***, which is still more than 25% greater than Mr. Muller's claimed LIFO loss of $196,161.20. *See id.* at 5. Consequently, under either FIFO or LIFO, Mr. Loos has the largest financial interest.

Unable to dispute that Mr. Loos has the largest loss under any recognized loss accounting method, Mr. Muller attempts to distract the Court from the statutorily mandated calculation of the competing movant's respective losses by resorting to an economically irrelevant argument about the number of Mr. Loos's "net shares purchased." *Id.* at 3-5. Unfortunately for Mr. Muller, even if the use of "net shares purchased" information could generate a useful loss calculation – which it cannot – that analysis still results in Mr. Loos having the larger financial interest here. In fact, on the date of the first partially curative disclosure of defendants' fraud in this case on February 28, 2008, Mr. Loos held over 50,000 net shares of Immersion. Thus, as of the date of the first partially curative disclosure in this case that could be used to calculate compensable damages, not only is Mr. Loos not a "net-seller" of Immersion securities, but Mr. Muller held only 15,000 net shares as of that date. Consequently, Mr. Loos has the largest financial interest even under a net shares purchased analysis. *See infra* §II.A.3.

Mr. Muller has a substantially smaller loss than Mr. Loos under any known method for calculating financial interest under the PSLRA and, therefore, cannot meet the primary requirement needed to be appointed the lead plaintiff. Thus, he seeks to challenge Mr. Loos, who is indisputably the statutory presumptive lead plaintiff, *see* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), by arguing that simply being a "net seller" of Immersion securities during the Class Period of May 3, 2007 to June 30, 2009, inclusive, somehow impacts Mr. Loos's ability to vigorously pursue the class claims in this action.

Again, not only is Mr. Muller's argument illogical, but his argument has been rejected by courts in this District and across the country. The proper analysis is not whether a plaintiff is denominated as a "net seller" or net purchaser" during a class period, but whether the plaintiff suffered a net loss after accounting for ***all*** of the plaintiff's class period trading in the subject company's stock. Here, Mr. Loos suffered an overall LIFO loss. Thus, using the language used by Mr. Muller, Mr. Loos is a so-called ***"net loser" – not a "net-gainer***" like the plaintiffs in the cases Mr. Muller cites. Therefore, the fact that Mr. Loos may have sold more shares than he purchased during the Class Period is completely irrelevant to his ability to serve as the lead plaintiff in this action. *See Richardson v. TVIA, Inc*., No. C-06-06304 RMW, 2007 U.S. Dist. LEXIS 28406, at *11-*13 (N.D. Cal. Apr. 16, 2007).

Finally, Mr. Muller implies, without analysis or support, that Mr. Loos's "high volume trading" renders him subject to some unexplained "unique defenses." Once again, Mr. Muller is incorrect. Not only, as demonstrated herein, was Mr. Loos's trading far from atypical, but the PSLRA's strong preference in favor of large investors to serve as lead plaintiff will, as a matter of course, typically result in the statutory "most adequate plaintiff" being a high volume trader who has many trades during the class period. *See* H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 ("The Conference Committee believes that . . . large investor[s] . . . will represent the interests of the plaintiff class more effectively . . . ."). Further, Mr. Muller's references to inapposite cases involving "day trading," an investment strategy that courts have routinely held does not constitute a cognizable "unique defense" under Fed. R. Civ. P. 23, is doubly irrelevant here because the undisputed evidence in the record is that Mr. Loos, who held 50,000 shares on the day of the first partially curative disclosure, was not a "day trader." *See* McCormick Decl., Ex. A. Thus, Mr. Muller has offered no factual or legal basis to rebut the presumption in favor of Mr. Loos to serve as the lead plaintiff here.

II. ARGUMENT

A. Mr. Loos Has the Largest Financial Interest No Matter How Losses Are Calculated in This Case

1. Mr. Loos Has The Largest Financial Interest Under FIFO

Under FIFO, Mr. Loos has a loss of ***over $1.2 million***. Mr. Muller has a loss of $196,161.20. Thus, under FIFO, Mr. Loos has by far the largest financial interest among the competing movants seeking appointment as lead plaintiff. Mr. Muller contends that FIFO has been rejected as a proper calculation of losses, and argues that Mr. Loos should not have used it to calculate his financial interest here. While some courts have chosen to use other similarly established accounting methods, numerous courts have utilized FIFO to determine which lead plaintiff movant possesses the largest financial interest out of lead plaintiff movants. For instance, in *Cisco*, Judge James Ware of this Court noted that "the first-in-first-out ('FIFO') accounting method . . . has been established as a legitimate method for computing losses or gains from stock purchases or sales." 2004 U.S. Dist. LEXIS 27008, at *11. *See also Hodges*, 2009 U.S. Dist. LEXIS 103663, at *6 (in determining the largest financial interest for lead plaintiff purposes, "[a] court may also look to the 'first-in, first-out' ('FIFO') method, which measures loss by treating the first share purchased as the first share sold"); *Schering-Plough,* 2003 U.S. Dist. LEXIS 26297, at *26 (finding FIFO an acceptable method of loss calculation at the class certification stage); *AOL*, 2006 U.S. Dist. LEXIS 17588, at *61-*62 ("both FIFO and LIFO have been used to calculate the financial stake of movants for lead plaintiff status in securities class actions"); *Veeco*, 233 F.R.D. at 333 (applying FIFO). Consequently, courts have, indeed, accepted the FIFO method as the proper means to calculate losses in PSLRA cases, and therefore, the size of Mr. Loos's losses under the FIFO method is relevant to the determination of the movant with "the largest financial interest in the relief sought" in this case.

2. Mr. Loos Has the Largest Financial Interest Under LIFO

Mr. Muller argues that LIFO is the "preferred method" of calculating losses for determining a movant's loss. Even assuming Mr. Muller's argument that only the LIFO method is the correct way to calculate losses on this motion – which, as demonstrated above, it is not – Mr. Loos ***still has a larger financial interest than Mr. Muller***. Under a LIFO calculation, ***as admitted by Mr. Muller*** (*see* Muller Opp. at 5), Mr. Loos has a loss of $256,821.02, while Muller's LIFO loss is only $196,161.20 – ***more than 25% less than Mr. Loos's***. Thus, even under Mr. Muller's "preferred method," Mr. Loos is the presumptive lead plaintiff. *See Richardson*, 2007 U.S. Dist. LEXIS 28406, at *11-*16 (appointing a movant who was a net seller because he still had a larger LIFO loss than the

other movant).

3. Mr. Loos Has the Largest Financial Interest Under the Net Shares Purchased Method

Mr. Muller's fall-back argument that the Court should find that he has the largest financial interest by looking at the number of "net shares purchased" is both factually and legally incorrect. Lead plaintiff decisions in this District look to competing lead plaintiff movants' relative losses to determine financial interest as the Class seeks to recover dollars in this action and the most precise measure of that is loss. *See Query v. Maxim Integrated Prods.*, 558 F. Supp. 2d 969, 974 (N.D. Cal. 2008) (finding movant had largest financial interest by citing to the movant's FIFO and LIFO loss); *Richardson*, 2007 U.S. Dist. LEXIS 28406, at *13-*14 ("Of the Olsten-Lax factors, courts consider the fourth factor, the approximate losses suffered, as most determinative in identifying the plaintiff with the largest financial loss.").

In contrast, because the price of a security will typically fluctuate during a class period, merely calculating the number of net shares a movant purchased (and/or sold) during such a period will not render a dollar loss calculation, but only a share count, which does not account for, or offers little assistance in assessing, prices paid or received, which can dramatically alter the amount of the out-of-pocket loss sustained on shares purchased during a class period. It is the dollar loss, of course, that reflects the plaintiff's potential recovery in the litigation. A "net shares purchased" analysis alone, however, will never lead to that figure. For that reason, even those courts that have looked at "net shares purchased" as a factor in determining the relative financial interests of competing lead plaintiff movants "typically equate 'largest financial interest' with the amount of potential recovery." *Siegall v. Tibco Software, Inc.*, No. C 05-2146 SBA, 2006 U.S. Dist. LEXIS 26780, at *11 (N.D. Cal. Feb. 24, 2006); *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999); *In re Critical Path, Inc. Sec. Litig.*, 156 F. Supp. 2d 1102, 1107-08 (N.D. Cal. 2001). This is so because a plaintiff who suffers a $1,000 loss based on 100 net shares purchased has a far greater "financial interest in the relief sought by the class" than one who suffers only a $500 loss based on 300 net shares purchased. Mr. Muller, understandably, neglects to make the essential link between the number of net ***shares purchased*** and the ***net dollar loss*** sustained on

the remaining shares held after the fraud began to be revealed. Therefore, he proposes the Court use a mathematically incomplete analysis that, by its own terms, results in nothing that will assist the Court in determining who has "the largest financial interest in the relief sought by the class" as required by the PSLRA (15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb)) and the Ninth Circuit's holding in *Cavanaugh*, 306 F.3d at 729-30. As the Ninth Circuit noted, "the district court ***must consider the losses*** allegedly suffered by the various plaintiffs before selecting . . . the one who 'has the largest financial interest.'" *Id.* (emphasis added; citation omitted).

Moreover, Mr. Muller's argument ignores the facts of this case and the requirements of loss causation. Here, the potential recovery for class members will include damages suffered upon the partially curative disclosure by defendants on February 28, 2008 regarding an accounting misstatement. *See* Complaint for Violation of the Federal Securities Laws, filed September 2, 2009, ¶29 (Dkt. No. 1). Immersion stock responded to this revelation by plummeting by over $10 per share. *Id.*, ¶30. Class members who held Immersion shares before and after the February 28, 2008 revelation will seek to recover that stock price decline as part of their damages. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (recognizing loss causation with respect to intra-class period partial disclosures). Thus, since it is included in the movants' "potential recovery," these losses are naturally also included in calculating each movant's financial interests for the purposes of selecting the lead plaintiff. Even Mr. Muller cannot dispute this fact because he must rely entirely on the losses caused to him by the February 2008 disclosure since he ***sold all*** of his Immersion stock in December 2008 – well before the final disclosures at the end of the Class Period.[2] Indeed, to have any losses at all, as an in-and-completely-out trader before the end of the Class Period, Mr. Muller must claim the existence of partially curative intra-Class Period disclosures that caused his loss or, as a matter of law, he would not have any cognizable securities claim. *See In re Level 3 Commc'ns, Inc. Sec. Litig*, No. 09-cv-00200-PAB-CBS, 2009 U.S. Dist. LEXIS 44706, at *8 (D. Colo. May 4,

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[2] *See* Declaration of Michael Goldberg in Support of Norbert Muller's Motion for Consolidation, Appointment as Lead Plaintiff and Approval of Lead Counsel, filed November 2, 2009, Ex. C (Dkt. No. 23).

2009) (movant sold a significant portion of its holdings prior to the first negative disclosure; "[i]t would be difficult at best for [movant] to prove loss causation with respect to shares it sold 'before the relevant truth begins to leak out' because the Supreme Court has held that in such cases, 'the misrepresentation will not have led to any loss'") (citation omitted); *Ruland v. Infosonics Corp.*, No. 06cv1231 BTM(WMc), 2006 U.S. Dist. LEXIS 79144, at *14-*15 (S.D. Cal. Oct. 23, 2006) ("[T]here does not appear to be any allegation that the truth began to leak out before June 12, 2006 .. . . Therefore, the Court will not consider any losses suffered by Ordway as a result of transactions prior to that date."); *In re CornerStone Propane Ptnrs*, No. C 03-2522 MHP, 2006 U.S. Dist. LEXIS 25819, at *30 (N.D. Cal. May 3, 2006) ("In the present action, defendants are correct in their assertion that plaintiffs who sold their stock before July, 27 2001, when the first corrective disclosure occurred, did not suffer any loss causally related to defendants' alleged misrepresentations.").

Here, to the extent the Court even considers the number of net shares purchased, based on a "net shares purchased" analysis at the time of the February 2008 partial disclosure, Mr. Loos, who had purchased 163,700 shares and sold 113,700, was still a net purchaser of 50,000 shares of Immersion stock. In contrast, Mr. Muller was a net purchaser of only 15,000 shares. Thus, irrespective of its very limited usefulness in determining which competing lead plaintiff movant has the largest potential recovery in this litigation for the purposes of selecting the PSLRA lead plaintiff, Mr. Loos had over ***three times more*** net shares purchased than Mr. Muller.

B. Mr. Loos Is Not Subject to Any "Unique Defense" Based on His Status as a So-Called "Net Seller" of Immersion Securities

1. Mr. Loos Was Not a "Net Gainer" but Rather a "Net Loser" Under a LIFO Loss Calculation

Unable to challenge Mr. Loos's overwhelmingly larger losses based on any recognized method of calculating losses for the purposes of selecting a lead plaintiff, Mr. Muller argues that Mr. Loos's status as a "net seller" – *i.e.*, someone who sold more shares than he purchased during a class period, in and of itself creates an obstacle to his representation of the Class here. Mr. Muller is incorrect. Indeed, the factor most relevant to the analysis of a so-called "net seller's" ability to represent a class is whether that class member, overall, made money or lost money as a result of his

or her class period trades. Courts have understandably found that net sellers who overall realized "***net gains***" in the company's stock should not serve as lead plaintiff. Here, Mr. Muller ***admits, by his own calculation***, that Mr. Loos not only did ***not*** have a net gain trading in Immersion stock, but, in fact, Mr. Loos suffered an overall ***net loss*** under LIFO of $256,821.02. *See* Muller Opp. at 5. Mr. Muller also admits that his own overall net LIFO loss was only $196,161.20. *Id.* Where a "net seller possesses a larger LIFO loss than all other competing movants, courts in this District appoint that "net seller" as the lead plaintiff.

For example, like here, *Richardson*, 2007 U.S. Dist. LEXIS 28406, at *11-*15, involved two competing lead plaintiff movants. One movant challenged the appointment of the other claiming he was a "net seller" of the company's securities. *Id.* In rejecting the net seller argument, Judge Whyte aptly noted that under LIFO, the "net seller" movant had losses of $119,435.53, while the other movant had losses of $69,649.07. *See id.* at *14. Judge Whyte then distinguished the cases cited by the movant with the lower LIFO loss (like those Mr. Muller cites here), noting that "unlike *Cable & Wireless*, *Comdisco*, and *McKesson* in which the net sellers profited from the net sales, this case presents a situation in which the net seller has a greater financial loss than the net purchaser." *Id.* Consequently, Judge Whyte appointed the "net seller" as lead plaintiff, stating that he "is qualified to serve as the lead plaintiff." *Id.* at *14-*15; *see also In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 20-21 (D. Mass. 2008) ("While defendants have cited cases stating that courts generally prefer 'net purchasers' to 'net sellers' as representative plaintiffs, there is scant support for the 'netting' methodology they propose; LIFO and FIFO are clearly the dominant methods for loss calculation.") (citation omitted). Likewise, here, it is not Mr. Loos's status as a "net seller" that is relevant to the lead plaintiff analysis, but whether he was a "net gainer" or a "net loser." It is undisputed that Mr. Loos suffered a net loss and that his net loss is over 25% larger than that of Mr. Muller. Thus, Mr. Loos is the presumptive lead plaintiff and Mr. Muller cannot rebut that presumption.

2. Mr. Loos Is Not Subject to a Unique Defense as a Net Seller

Mr. Loos is also neither "atypical" nor subject to a potential "unique defense" based on his status as a "net seller" because, when defendants in this case made their first partially curative disclosure on February 28, 2008, Mr. Loos still ***held*** 50,000 shares of Immersion stock. Because all class members who purchased before February 28, 2008 and held those shares through that date, will seek to recover damages caused by the drop in Immersion's stock price resulting from that partial disclosure (including Mr. Muller who, given his sale of all his shares before the end of the Class Period, logically must base his claim for any damages on that disclosure), Mr. Loos would not even be considered a net seller at that pivotal point in the Class Period.

In *Richardson*, 2007 U.S. Dist. LEXIS 28406, at *18-*21, Judge Whyte found that an alleged "partial disclosure" of the truth of the company's financial condition prior to the end of the class period would support losses by the "net seller" and actually rendered the "net seller" typical since the entire class would want to recover the damage caused by the partial disclosure:

> Although TVIA's September 28, 2006 press release [prior to the end of the class period] announcing the dramatically lower revenue projections for Q2 2007 may not constitute an explicit corrective disclosure exposing the alleged fraud, Metzman may nevertheless be able to establish loss causation by demonstrating a causal connection between the alleged deceptive acts and the injury suffered. Furthermore, the September 28, 2006 press release was immediately followed by the single greatest drop in share price, along with the highest trading volume, during the Class Period. In fact, the majority of approximate losses suffered by both movants resulted directly from this event. It is not unlikely that other class members, as well as both movants, will seek to recover for this loss, and it is also not unlikely that defendants will raise the same loss causation defense against the entire class. The court therefore cannot conclude that the potential vulnerability to a loss causation defense is unique to Metzman's case. Pollard-Lowsley has not adequately rebutted Metzman's showing that he satisfies the typicality and adequacy requirements.

Id. at *20-*21; *see also In re NTL Sec. Litig.*, No. 02 Civ. 3013 (LAK) (AJP), 2006 U.S. Dist. LEXIS 5346, at *27-*41 (S.D.N.Y. Feb. 14, 2006).[3]

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[3] In *NTL*, the court, in deciding a motion for class certification, rejected defendants' challenge to the typicality of a plaintiff because he was a "net seller." 2006 U.S. Dist. LEXIS 5346, at *40-*41. The plaintiff also had a LIFO loss like Mr. Loos does here. In addition, there were partial disclosures in *NTL* which caused some of the plaintiff's loss, just as the plaintiffs in this case will show. The *NTL* court found that the plaintiff's "situation is ***typical*** of others in the class – a need to show the drop in NTL's share price during the class period was not attributable to general factors but to 'dribbled' disclosures or 'leakage' of truthful information regarding NTL's prior

Similarly, in this case, both competing movants must predicate their loss/damages calculations entirely on the partial disclosures, or neither will have a compensable claim. *See Dura*, 544 U.S. at 346-47 (requiring a causal connection between revelation of the fraud and the plaintiff's claimed loss). Therefore, irrespective of whether or not Mr. Loos was ultimately an overall "net seller" by the end of the Class Period, he nevertheless held 50,000 shares of Immersion stock at the time of the first partially curative disclosure in this case, which makes his claims typical of the other members of the class. *See, e.g.*, *Seidman v. Am. Mobile Sys.*, 157 F.R.D. 354, 362 n.12 (E.D. Pa. 1994) ("the fraud-on-the-market theory assumes that the market will account for disclosed information regarding a company's prior poor performance and price the stock accordingly") (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 243-44 (1988)); *Rubenstein v. Collins*, 162 F.R.D. 534, 538 (S.D. Tex. 1995) ("The simultaneous presence of a group of persons who bought stock before the price of the stock went down, and a group of persons who bought after the price of the stock went down does not preclude them from being part of the same class for class action purposes.").[4] For instance, in *Schering-Plough*, 2003 U.S. Dist. LEXIS 26297, at the class certification stage where lead plaintiffs are subject to more rigorous scrutiny than at the lead plaintiff stage, defendants argued that the lead plaintiff FSBA was a "net seller" of the company's stock and therefore an atypical plaintiff. The court found the defendants' argument perplexing because it noted that the plaintiff's "Section 10(b) claim is based on losses that resulted from ***purchases*** of Schering-Plough stock made ***during*** the Class Period. Any capital gains made with respect to the ***sale*** of shares purchased ***before*** the Class Period are irrelevant." *Id.* at *26 (emphasis in original).

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misrepresentations and/or omissions." *Id.* (emphasis added). Similarly, here, Mr. Loos held 50,000 net shares as of the date of the first partially curative disclosure. Consequently, Mr. Loos's situation is typical of the other class members who will claim damages resulting from that revelation (including Mr. Muller).

[4] The following is a non-exhaustive list of cases certifying classes of both ins-and-outs and holders: *Freedman v. Louisiana-Pacific Corp.*, 922 F. Supp. 377, 401 (D. Or. 1996); *In re AST Research Sec. Litig.*, No. CV 94-1370 SVW(SHx), 1994 U.S. Dist. LEXIS 20850, at *12-*13 (C.D. Cal. Nov. 10, 1994); *Yamner v. Boich*, No. C-92-20597 RPA, 1994 U.S. Dist. LEXIS 20849, at *20-22 (N.D. Cal. Sept. 15, 1994); *In re Scorpion Techs., Inc. Sec. Litig.*, No. C 93-20333 RPA, 1994 U.S. Dist. LEXIS 21413, at *12-*14 (N.D. Cal. Aug. 1, 1994); *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985).

C. Mr. Loos's Trading Does Not Render Him Atypical

Mr. Muller also suggests, without factual or legal analysis, that because Mr. Loos engaged in "high volume" trading he is somehow atypical. Mr. Muller is again incorrect. This is an action based on the fraud-on-the-market doctrine, and "'[d]ifferences in sophistication, etc., among purchasers have no bearing in the impersonal market fraud context, because dissemination of false information necessarily translates through market mechanisms into price inflation which harms each purchaser identically.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 506 (9th Cir. 1992) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905-07 (1975)).

Furthermore, although the only two cases that Mr. Muller cites with his undeveloped "high volume" trading comment involved "day traders," Mr. Loos was not a "day trader.[5] Indeed, presumably because Mr. Loos's PSLRA certification, on its face, demonstrates that he was not a "day trader" and because Mr. Muller has no facts whatsoever to substantiate any position to the contrary, Mr. Muller does not even assert that Mr. Loos was a "day trader." However, even if Mr. Loos was a day trader, which he indisputably is not, his status as such would still be legally irrelevant. Not only are both of the cases Mr. Muller cites easily distinguishable from the situation here,[6] but being a "day trader" is not be a basis to challenge the suitability to serve as a class

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[5] As one court noted, "[t]he web site www.investorwords.com . . . defines a 'day trader' as a '[v]ery active stock trader who ***holds positions for a very short time*** and makes several trades each day. Day traders are individuals who are trying to make a career out of buying and selling stocks very quickly, often making dozens of trades in a single day and ***generally closing all positions at the end of each day***.'" *Taubenfeld v. Career Educ. Corp.*, No. 03 C 8884, 2004 U.S. Dist. LEXIS 4363, at *10 n.2 (N.D. Ill. Mar. 22, 2004) (emphasis added). Unlike a "day trader," Mr. Loos was not completely in and out of the stock each day, nor did he generally close all positions at the end of the day. Rather, he held long 50,000 shares on the date of defendants' first partial curative disclosure. This demonstrates that Mr. Loos, like the other members of the class, was trading based upon the information available in the market – information which defendants had disclosed, as well as information they withheld.

[6] In both cases the plaintiff at issue faced additional disabling problems with respect to their representation of the class that Mr. Muller has not – and cannot – raise here. In *Tsirekidze v. Syntax-Brillian Corp.*, No. CV-07-2204-PHX-FJM, 2008 WL 942273 (D. Ariz. Apr. 7, 2008), the court did not refuse to appoint a day trader as lead plaintiff based solely on his trading strategy, noting that "***a day trader is not ipso facto disqualified from the lead plaintiff role***," but rather rejected the movant based on serious questions as to his adequacy based on his signing a lead plaintiff certification with two different, competing lead plaintiff groups. *Id.* at *4 (emphasis added). In *In re Safeguard Scientifics*, 216 F.R.D. 577 (E.D. Pa. 2003), on a class certification motion following discovery on

representative or a lead plaintiff.

It is well established under the fraud-on-the-market doctrine that even investors who engage in "erratic, counterintuitive, or speedy trading practices" have claims that are typical, because "[t]he securities laws . . . exist for the protection of every investor, not just the conservative or wise investor." *In re Electro-Catheter Sec. Litig.*, No. 87-41, 1987 U.S. Dist. LEXIS 13500, at *12 (D.N.J. Dec. 3, 1987) ("That one plaintiff may have decided to buy shares despite recent corporate losses, or to buy and then quickly resell shares, does not make his or her case atypical. Indeed, where plaintiffs proceed on a fraud-on-the-market theory, all traders suffer equally from the alleged unlawful price inflation regardless of their trading strategy or degree of sophistication."). As the court in *Moskowitz v. Lopp*, 128 F.R.D. 624 (E.D. Pa. 1989), explained:

> It can be stated without fear of gainsay that the shareholders of every large, publicly traded corporation includes institutional investors, short-sellers, arbitragers etc. The fact that these traders have divergent motivations in purchasing shares should not defeat the fraud-on-the-market presumption absent convincing proof that price played no part whatsoever in their decision making. If defendants believe that this stretches the concept of reliance beyond the intent of the statute, their course of attack is to overrule *Basic*, not render its holding meaningless.

Id. at 631 (emphasis added). Accordingly, "day traders" are routinely certified as class representatives in fraud-on-the-market cases such as this one. *See, e.g.*, *Crossen v. CV Therapeutics,* No. C 03-03709 SI, 2005 U.S. Dist. LEXIS 41396, at *17 (N.D. Cal. Aug. 10, 2005) (Illston, J.) (rejecting defendants' classification of the plaintiff as a day trader because he had relied upon defendants' false statements in his trading); *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 123-24 (S.D.N.Y. 2001) (certifying alleged day traders).[7]

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the issue, the court found a day trader's particular trading subjected him to unique defenses at the class certification stage because he purchased stock regardless of the fraudulent omissions. *Id.* at 582.

[7] *See also Saddle Rock Partners Ltd. v. Hiatt*, No. 96 Civ. 9474 (SHS), 2000 U.S. Dist. LEXIS 11931, at *10-*14 (S.D.N.Y. Aug. 17, 2000) (held that unless colored or influenced by insider information, momentum traders or day traders are clearly covered by the fraud on the market doctrine, as "the fact that [a momentum trader or a day trader] may have traded [securities] on the basis of short term price drops which he believed to reflect market inefficiencies indicates that he

Therefore, Mr. Muller has offered no "proof" as required by the PSLRA, *see* 15 U.S.C. §78u-4(a)(3)(B)(iii)(II), to rebut the presumption in favor of Mr. Loos as being the "most adequate plaintiff," and there is absolutely no obstacle to Mr. Loos's ability to represent the class here.

III. MR. MULLER IS ENTITLED TO NO DISCOVERY

The PSLRA does not permit discovery concerning the adequacy of a proposed lead plaintiff absent a threshold showing that there is "a reasonable basis for finding that the presumptively most adequate plaintiff is incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iv). Courts strictly adhere to this standard, very rarely granting discovery, and only when there is evidence providing a reasonable basis to diverge from the general rule denying it. *In re Cendant Corp. Litig.*, 264 F.3d at 270 n.49 ("[c]ourts must . . . take care to prevent the use of discovery to harass presumptive lead plaintiffs, something that the Reform Act was meant to guard against."). "The PSLRA is clear [that] a member of the purported plaintiff class must present 'proof' [that] the presumptively most adequate plaintiff will not fairly and adequately protect the class or is subject to unique defenses . . . Speculative assertions . . . are therefore insufficient to rebut the lead plaintiff presumption . . .'" *Montoya v. Herley Indus.*, No. 06-2596, 2006 U.S. Dist. LEXIS 83343, at *5-6 (E.D. Pa. Nov. 14, 2006) (citations omitted).[8]

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may have been relying on the integrity of the market to establish the more stable, longer term price"); *Kops v. Lockheed Martin Corp.*, No. CV 99-6171-MRP, slip op. at 15-16 (C.D. Cal. Nov. 10, 2003) (certifying day trader on the basis that while the plaintiff may have more active trading practices than other class members, this did not render him an inadequate or atypical representative) (Declaration of Tricia L. McCormick in Support of Reply Memorandum in Further Support of John P. Loos's Motion for Consolidation, Appointment of Lead Plaintiff and Approval of Selection of Counsel, Ex. A, filed herewith); *Taubenfeld v. Career Educ. Corp.*, No. 03 C 8884, 2004 U.S. Dist. LEXIS 4363, at *12-*13 (N.D. Ill. Mar. 19, 2004) (PSLRA lead plaintiff decisions rejecting argument that "day trader" was not typical or could not rely on the integrity of the market").

[8] *See also In re SemGroup Energy Partners, L.P.*, No. 08-425, 2008 U.S. Dist. LEXIS 87218, at *7-8 (N.D. Okla. Oct. 27, 2008) ("The burden of proof of inadequacy of the presumptive lead plaintiff rests with parties contesting its appointment. Challengers must provide a concrete showing of a conflict of interest to rebut the presumption of adequacy. Moreover, speculative assertions are insufficient to rebut the lead plaintiff presumption. Mere innuendo and inferences will not suffice to

In the instant case, Mr. Muller has "produced not one iota of evidence to give the Court even a reasonable basis to authorize discovery." *Ferrari v. Impath, Inc.*, No. 03-5667, 2004 U.S. Dist. LEXIS 13898, at *23-24 (S.D.N.Y. July 15, 2004) (refusing discovery of presumptive lead plaintiff). Muller's request for discovery from Mr. Loos, whose net losses make him the movant with the largest financial interest under LIFO or FIFO, is baseless. Mr. Muller's proffered argument for his improper request for discovery is solely premised on a patently erroneous legal argument about Mr. Loos's trading in Immersion stock -- an argument that no amount of discovery can improve since all of Mr. Loos's trades in Immersion stock are already before the Courts, they are entirely transparent, and Mr. Muller's request for discovery itself demonstrates he has no cognizable argument based on Mr. Loos's transactions. Indeed, no court has permitted the kind of unsupported and facially futile fishing expedition that Mr. Muller seeks to engage in here. Rather, courts are to 'take care to prevent the use of discovery to harass presumptive lead plaintiffs,' something the Reform Act was 'meant to guard against.'") (internal citation omitted) (McCormick Reply Decl., Ex. B). Indeed, while Mr. Muller has not even attempted to meet his high burden to show facts providing "reasonable basis" to conduct discovery of Mr. Loos that courts, in the few instances out of the literally hundreds of lead plaintiff motions litigated since adoption of the PSLRA have required to allow any discovery at this stage, Mr. Muller's request does constitute an outright admission by him that it does not now possess any ***"proof"*** as required by the PSLRA to rebut the presumption in favor of Mr. Loos to be appointed lead plaintiff here.[9]

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support allegations of atypicality, conflict of interest or unique defenses") (internal citations omitted).

[9] The single case Mr. Muller relies on for his argument does not support his position, because that court did not authorize discovery based on the type of purely (albeit meritless) legal contention that Mr. Muller has alleges here that discovery cannot supported. In *Prissert v. Emcore Corporation*, Civ. No. 08-1190 MV/RLP, slip op. (D.N.M. Sept. 25, 2009) (Goldberg Reply Decl., Dkt. 51, Ex. B), the issue was the undisclosed "complex structure" and "atypical investment

Because Mr. Muller lacks any factual predicate to request discovery, limited discovery should be denied. *See SemGroup*, 2008 U.S. Dist. LEXIS 87218, at *9-10 (denying discovery of a lead plaintiff movant even though other movants argued that his former position and ownership interest created a unique defense); *In re: Oppenheimer Rochester Funds Group Sec. Litig.*, No. 09-md-02063-JLK-KMT, at 9 (D. Colo. Nov. 18, 2009) (denying discovery: "The PSLRA limits discovery relating to whether a member of a purported class is the most adequate plaintiff to situations in which the movant 'first demonstrates a reasonable basis' for its assertions of inadequacy. [15 U.S.C. § 78u-4(a)(3)(b)(iv)]); *Ferrari,* 2004 U.S. Dist. LEXIS 13898, at *24 (denying lead plaintiff discovery); *Kinsey v. Network Associates, Inc*., 77 F. Supp. 2d 1111, 1116 (N.D. Cal. 1999) (denying discovery of lead plaintiff movant absent showing of a reasonable basis).

IV. CONCLUSION

Thus under any recognized method of calculating losses or determining the financial interest of a lead plaintiff movant, not only does Mr. Loos have, by far, the greatest financial interest in the relief sought by the Class, he otherwise meets the requirements of Fed. R. Civ. P. 23(a)(3) and (4). Therefore, Mr. Loos should be appointed as lead plaintiff, and his selection of Brower Piven, A Professional Corporation, as lead counsel for the Class and Coughlin Stoia Geller Rudman & Robbins LLP as liaison counsel, should be approved.

DATED: December 4, 2009

Respectfully submitted,

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strategies" of a hedge fund that could not be divined from materials submitted to the court. *See Id.*, at 7. Here, Mr. Loos is a typical, large individual investor whose transactions at issue in the case are transparent and have been fully revealed to the Court in his own submissions.

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I hereby certify that on December 4, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List, and to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 4, 2009.

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